

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Chillicothe and Ashville, Ohio)

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MM Docket No. 99-322
RM-9762

To: John A. Karousos, Chief
Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY TO "COMMENTS AND OBJECTIONS OF JOINT PARTIES"

Secret Communications II, L.L.C. ("Secret"), by its attorneys, and pursuant to Sections 1.415 and 1.420 of the Commission's Rules and Regulations, hereby replies to the "Comments and Objections of Joint Parties" filed on December 20, 1999,¹ in the above-captioned proceeding.²

INTRODUCTION

1. By its Notice of Proposed Rule Making, DA 99-2356, released October 29, 1999 ("NPRM"), the Mass Media Bureau, acting pursuant to delegated authority, proposed to amend the Commission's FM Table of Allotments by removing Class B FM Channel 227 on which

¹ The Joint Parties consist of the following: North American Broadcasting Co., licensee of Stations WMNI(AM) and WBZX(FM), Columbus, Ohio; WCLT Radio Incorporated, licensee of Stations WCLT(AM) and WCLT-FM, Newark, Ohio; and Franklin Communications, Inc., licensee of Stations WVKO(AM) and WSNY(FM), Columbus, Ohio.

² Since these Reply Comments are being filed by the January 4, 2000 deadline for Reply Comments, they are timely filed.

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broadcast station WKKJ operates from Chillicothe, Ohio and allotting it to Ashville, Ohio as that community's first local transmission service and modifying WKKJ's license accordingly.

2. The Opposing Parties do not seriously contest the Bureau's decision on either the facts or the law. Rather, their entire effort appears to rest on speculations that Secret, or for that matter any owner of WKKJ, may in the future seek FCC approval to move the station's transmitter site closer to Columbus, Ohio, and on that basis, they request the Commission to act anticipatorily to permanently bar such a move no matter where the public interest may be best served in the future. The Bureau should, as a matter of law, reject this request and proceed to adopt a Report and Order implementing the NPRM without any condition barring a transmitter site move or any other facilities change in the future. Given that the owner of the station, no matter who it is, would have to obtain the Commission's prior approval for any transmitter site move, the Commission retains ample authority to determine whether the public interest would be served by approval of a specific proposal based on the facts presented at the time.

DISCUSSION

3. The Bureau's proposal as contained in the NPRM is correct on the facts and on the law. It is undisputed that Ashville is a "community" for FM channel allotment purposes. It is further undisputed that Ashville has no AM or FM broadcast station licensed to it and that Ashville is of sufficient size to warrant a Class B channel being allotted to it. Moreover, it is undisputed that the proposal is consistent with the Commission's policies under Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992). Lastly, it is undisputed that since the allotment of FM Channel 227 to Ashville, Ohio represents a first local transmission service for the community and that Chillicothe retains several full service allotments, the allotment to

Ashville is strongly favored under the Commission's FM allotment priorities.³ For those reasons alone, the Bureau should promptly finalize its proposal and adopt and issue its Report and Order to that effect.

4. The musings of the Opposing Parties about another FM allotment proceeding to which Secret was not a party, about Secret's construction timetable, etc. are "red herrings" and simply irrelevant to this proceeding. With respect to the Reynoldsburg, Ohio proceeding,⁴ the proposal of a former owner of WKKJ was denied based on facts unique to that proposal. That decision of the Commission offers nothing precedential or instructive in this proceeding.

5. It is true that Secret has not begun to build the antenna structure that is contemplated under the construction permit (FCC File No. BPH-981201IA). The circumstances are straightforward and not suspicious. When the station first decided to improve its facilities, the proposal was for a 760 foot antenna height. When the FAA was notified, it expressed some concern. A modified request for FAA approval for a lower tower height was then submitted and was approved, and the FCC application was amended to reduce the height to that approved by the FAA. After the FCC granted the application as amended, Secret decided to return to the FAA and request the height that had originally been desired. Eventually the FAA approved the

³ See Modification of FM and TV Authorizations to Specify a New Community of License, 4 Fcc Rcd 4870 (1989) at 4873.

⁴ See Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Chillicothe, Forest, Lima, New Washington, Peebles and Reynoldsburg, Ohio), DA 96-1331, released August 20, 1996, 61 Fed. Reg. 44288-89 (Aug. 28, 1996 ed.).

higher structure, and Secret filed its application with the FCC for that height.⁵ The application remains pending to our knowledge. It is as simple as that. There is no lack of candor, contrary to the spurious suggestion of the Opposing Parties made at pages 4 and 5 of their pleading.

6. Attached hereto as Exhibit A is an Engineering Statement fully refuting the fallacious claim by the Opposing Parties that the principal city contour of WKKJ under the construction permit (FCC File No. BPH-981201IA) will not cover at least 80% of the population of Chillicothe, Ohio, a claim that will become irrelevant under the NPRM proposal to reallocate Channel 227 to Ashville, Ohio. In any event, there is no basis whatsoever for the Opposing Parties to request the Commission to rescind the construction permit (FCC File No. BPH-981201IA), to dismiss the minor modification application or to terminate unfavorably this proceeding.

7. Not only is there no defect in the proposal contained in the NPRM, there is no public interest reason to add a condition to the reallocation which would permanently bar any owner of WKKJ from seeking a facilities change. To the contrary, a condition containing a permanent bar would be adverse to the Commission's policy of encouraging licensees to "upgrade their facilities in order to improve service to their audiences."⁶ As the Opposing Parties point out, the Commission did not impose such a condition in the Hilliard proceeding.⁷

⁵ See Minor Change Application FCC File No. BMPH-990820IF.

⁶ See Report and Order, Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses, 98 FCC 2d 916, 919 (1984).

⁷ See Report and Order, In the Matter of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Marysville and Hilliard, Ohio), DA 99-2378, slip opinion released October 29, 1999.

Furthermore, the condition imposed in the Oceanside proceeding mentioned by the Opposing Parties does not on its face bar the licensee of that station from seeking FCC approval to change the station's facilities at some future time.⁸ To read the condition otherwise is to impute to the Commission an arbitrary and capricious intent. On its face, the condition requires the licensee, from a licensing standpoint, to conform its authority to the rule making reallocation action. The Commission reserves the full discretion to evaluate where the public interest lies in the event the licensee seeks permission to change its facilities by transmitter site relocation or otherwise.

8. The danger of a permanent bar is that such a condition cannot take into consideration a wide range of factors and considerations which may make a facilities move reasonable and appropriate, such as the loss of a transmitter site, the desirability of moving to a new structure to accommodate digital operations, to accommodate the transmission facilities of other stations, to take advantage of changes permitted by rule makings and actions of the Commission, etc. In the absence of a permanent bar, the Commission loses no authority and retains the necessary flexibility to act in the public interest.

9. In the end, the Opposing Parties are simply acting as businessmen concerned about competition. Their credibility here is questionable. They should not be allowed to use the Commission's rule making processes to try to anticipate every possible competitive threat and to foreclose such threat. This rule making is not about competition in Columbus, Ohio. It is about providing Ashville, Ohio with its first and only aural transmission service. If an owner of WKKJ

⁸ See Report and Order, In the Matter of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Oceanside and Encinitas, California), DA 99-1837, released September 10, 1999.

were ever to seek to move the station's transmitter site toward Columbus, Ohio, the Opposing Parties, who are sophisticated broadcasters, are free to make their views known at that time for the Commission to take into consideration. At least at that point, unlike now, the Commission will have a specific proposal before it and a full record of facts and arguments on all sides to be evaluated under the public interest standard.

CONCLUSION

Based on the foregoing, Secret Communications II, L.L.C. respectfully requests the Bureau to finalize its proposal as set forth in the NPRM, to decline to add any condition that has the effect of permanently barring any facilities improvement in the future and to speedily adopt and release its Report and Order to effectuate the NPRM proposal.

Respectfully submitted,

SECRET COMMUNICATIONS II, L.L.C.

By: Amy L. Van de Kerckhove
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Dated: January 4, 2000

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Secret Communications II, L.L.C.
Reply to “Comments and Objections of Joint Parties”
Amendment of Section 73.202(b) Table of Allotments
WKKJ(FM), Chillicothe, Ohio
Exhibit A

ENGINEERING STATEMENT

DENNY & ASSOCIATES, P.C.
CONSULTING ENGINEERS
WASHINGTON, D.C.

**ENGINEERING STATEMENT
IN SUPPORT OF REPLY COMMENTS
MASS MEDIA DOCKET NUMBER 99-322
SECRET COMMUNICATIONS II, L.L.C.
STATION WKKJ(FM)
CHILLICOTHE, OHIO
CH 227B 43 KW (MAX-DA, H&V) 162 METERS**

This Engineering Statement was prepared on behalf of Secret Communications II, L.L.C. (Secret) in support of its Reply Comments to the Notice of Proposed Rule Making (NPRM) in Mass Media Docket Number 99-322, *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Chillicothe and Ashville, Ohio)*, 64 FR 60150. In its petition for rule making, Secret requests the reallocation of Channel 227B from Chillicothe to Ashville, Ohio, as the community's first local aural service and the modification of the license for its station WKKJ to specify Ashville as the community of license.

Comments were filed in response to the NPRM by North American Broadcasting Co., licensee of WMNI(AM) and WBZX(FM), Columbus; WLCT Radio Incorporated, licensee of WLCT(AM) and WLCT-FM, Newark; and Franklin Communications, Inc., licensee of WVKO(AM) and WSNY(FM),

Columbus; all Ohio (hereinafter, the Joint Commenters). Although Secret has shown that the WKKJ facilities authorized by the outstanding construction permit (FCC File Number BPH-981208IA) and specified in the pending application for modification of construction permit (FCC File Number BMPH-990820IF) will provide 70 dB μ or better signal strength to 92.0 percent of the Chillicothe population and 93.8 percent of the land area within the Chillicothe city boundary, the Joint Commenters claim that the authorized and proposed WKKJ facilities will not provide a predicted signal strength of 70 dB μ or better to Chillicothe as required by Section 73.315 of the FCC Rules.¹ This engineering statement shows that the Joint Commenters' claim relies on flawed technical information and is therefore baseless.

The Joint Commenters submit a technical statement and two exhibits in support of their claim that the authorized and proposed WKKJ facilities do not comply with Section 73.315 of the FCC Rules. The technical

¹ Under current FCC policy, proposals are found to be in substantial compliance with Section 73.315(a) of the FCC Rules if 80 percent or more of the total population or area within the principal community is predicted to receive signal strength of 70 db μ or greater.

statement provides a brief description of the accompanying Exhibits 1 and 2, which the Joint Commenters represent to be maps depicting the location of the predicted WKKJ 70 dB μ contour with respect to the city limits of Chillicothe. The heading on the technical statement as well as the data contained in the title blocks of the associated Exhibits 1 and 2 incorrectly specify the WKKJ facilities to be 19.5 kilowatts (kW) and CORAMSL² of 267 meters. The correct facilities for WKKJ are as follows. In the case of the outstanding WKKJ construction permit, the authorized facilities are maximum effective radiated power (ERP) of 43 kW and antenna radiation center height of 409 meters above mean sea level (AMSL), which corresponds to an antenna radiation center height above average terrain (HAAT) of 162 meters. In the case of the pending WKKJ application for modification of construction permit, the specified facilities are ERP of 19.5 kW and antenna radiation center height of 490 meters AMSL, which corresponds to an antenna radiation center HAAT of 243 meters.

² While not explicitly defined in the Joint Commenters' technical statement, CORAMSL is believed to be an acronym for Center Of Radiation Above Mean Sea Level referring to the antenna radiation center height above mean sea level used in the preparation of the Joint Commenters' coverage studies.

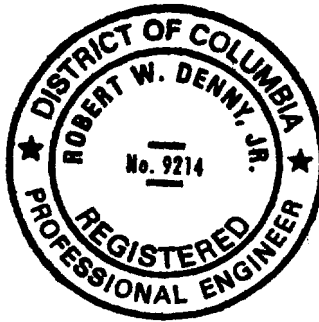
The same site is authorized by the WKKJ construction permit and specified in the pending WKKJ application for modification of construction permit. Both of the associated WKKJ FCC engineering files show that the average terrain elevation at the authorized and proposed WKKJ site is 247 meters AMSL. As the studies submitted by the Joint Commenters are based upon an ERP of 19.5 kW and an antenna radiation center height of only 267 meters AMSL, which corresponds to an antenna radiation center HAAT of only 20 meters, the distances to the predicted WKKJ 70 dB μ contour are grossly understated in the Joint Commenters' Exhibits 1 and 2. Consequently, the Joint Commenters' estimates of the percentages of population and area served by WKKJ, and, therefore, their conclusion that the Secret proposals do not comply with Section 73.315 of the FCC Rules, are incorrect.

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Secret Communications II, L.L.C.

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We declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 1999.



A handwritten signature in black ink, appearing to read "Robert W. Denny, Jr.", written over a horizontal line.

Robert W. Denny, Jr., P.E.

A handwritten signature in black ink, appearing to read "Robert G. Mallery", written over a horizontal line.

Robert G. Mallery

CERTIFICATE OF SERVICE

I, Renee Williams, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that on this 4th day of January, 2000, copies of the foregoing "Comments" were hand delivered or mailed, as indicated, to the following:

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